Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	CC Docket No. 96-187

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. (TW Comm), by its attorneys, hereby submits its reply comments regarding the Commission's notice of proposed rulemaking issued in this proceeding.[1] In these reply comments, TW Comm states that the majority of commenters support the Commission's second interpretation of the term "deemed lawful" -- that incumbent local exchange carrier ("ILEC") tariffs would be presumed lawful and would be treated in a manner similar to the Commission's treatment of non-dominant carrier tariffs.

I. ILEC Access Tariffs Not In Conformance with Part 69 of the Commission's Rules Cannot Be "Deemed Lawful" Without Waiver of Those Rules.

Several ILECs, including GTE Service Corp. ("GTE") and Cincinnati Bell Telephone Co. ("CBT") and United States Telephone Association ("USTA"), argue that the Commission should eliminate the requirement that ILECs request and receive waivers of the Commission's Part 69 access charge rules[2] on the basis that requiring ILECs to obtain waivers in order to file tariffs which violate those rules "impermissibly extends the statutory [seven] or [fifteen] day notice

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[1] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 (*Notice of Proposed Rulemaking*), FCC 96-367, released September 6, 1996 ("Notice").

[2] The Commission's rules and policies governing access pricing are codified at Part 69 of the Commission's Rules and Regulations, 47 C.F.R. Part 69.

period for tariff filings."[3]

These ILECs seeking elimination of the Part 69 waiver process, demonstrate all too convincingly the fallacy of the Commission's first suggested interpretation of the "deemed lawful" language of Section 204(a)(3).[4] Under the interpretation of "deemed lawful" articulated by those parties, ILECs would be free to file access service tariffs and to have those tariffs become effective in 7 or 15 days (depending upon whether the tariffs contained rate increases or decreases) and be considered to be lawful, even where those tariffs are in blatant contravention of the Commission's rules governing access services. Stated simply, if ILECs were free to file access tariffs and to have those tariffs be deemed lawful irrespective of whether or not they violated the Commission's access rules, there would be no point in the Commission promulgating rules governing access services.

It has long been held that tariffs which violate Commission rules are patently unlawful and may be rejected at the outset.[5] Unless applicable Commission rules governing the lawfulness of tariff filings are waived, tariff filings which contravene those rules are unlawful. Such filings cannot reasonably be construed to be deemed lawful, irrespective of Section 204(a)(3). Yet that is precisely the effect of the interpretation of "deemed lawful" being advanced by these carriers.

The Commission is committed to undertaking a comprehensive review of its access charge rules in the coming months. Indeed, the Commission has made access reform one of the

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[3] GTE Comments at 8. See also CBT at 8-9, USTA at 5-6.

[4] The ILEC interpretation of "deemed lawful" is discussed below in Section II.

[5] Associated Press v. FCC, 448 F.2d 1095 (1971).

three parts of its "competition trilogy.[6] There would be no point in undertaking access reform if, as suggested by GTE and its ILEC brethren, ILECs were free to file access service tariffs and to have those tariffs become effective and be accorded the status of lawfulness without regard to their compliance *vel non* with Commission rules governing access services. Contrary to those commenters' assertions, ILEC tariff filings which violate effective Commission rules cannot be deemed lawful unless or until those rules have been waived with respect to those tariffs. Accordingly, the Part 69 waiver process remains an essential aspect of the Commission's authority to regulate access services, notwithstanding the tariff streamlining procedures mandated by Section 204(a)(3). Moreover, the very notion that ILECs no longer would require waivers in order to have non-conforming tariffs become effective demonstrates why the "deemed lawful" language of Section 204(a)(3) should be interpreted as creating no more than a presumption of lawfulness. It should not be interpreted in a manner so as to accord lawful status -- and nearly immediate effectiveness -- to ILEC access tariffs which on their face contravene validly-promulgated and effective Commission rules.

II. The Record Established in the Comments Supports the Commission's Second Interpretation of "Deemed Lawful."

Section 204(a)(3) states, in part, that local exchange carrier ("LEC") charges, practices, regulations, or classifications shall be "deemed lawful."[7] Most commenters share TW Comm's position that the second of the Commission's suggested interpretations is the appropriate

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[6] See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, FCC 96-325 at ¶¶ 6-9, released August 8, 1996.

[7] 47 U.S.C. § 204(a)(3) (1996).

interpretation of that term.[8] Pursuant to the second interpretation, ILEC tariffs would enjoy a presumption of lawfulness and would be treated in a manner similar to the Commission's treatment of non-dominant carrier tariffs.

Predictably, most of the ILECs support the Commission's first interpretation of "deemed lawful," under which ILEC tariffs would be considered to be lawful from their effective date until such time as the Commission, following an investigation, determines them to be unlawful. The determination of unlawfulness would be prospective only and, therefore, would preclude any award of damages prior to the determination of unlawfulness. BellSouth, Southwestern Bell Telephone Company ("SWBT"), GTE and Pacific favor the first approach, contending that a tariff revision that becomes effective under the streamlined filing procedures would be the "lawful rate" until the Commission concluded in a rate proceeding under Section 205 that a different rate would be lawful for the future.[9] NYNEX, Pacific Bell ("Pacific"), US West and the USTA go even further and argue that the term "deemed lawful" means that a streamlined tariff filing is lawful when filed.[10]

SWBT and USTA conveniently select one definition of "[to] deem" contained in Black's Law Dictionary and hold it out as proof that to deem means "to determine."[11] In fact, as the

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[8] See, *e.g.*, Comments of AT&T at 4-8, America's Carriers Telecommunications Association ("ACTA") at 4-8, Competitive Telecommunications Association at 1-3, Frontier Corp. at 2-3, General Services Administration at 5-6, MFS Communications Co. at 6-9, Sprint Corp. at 2-4, Telecommunications Resellers Association at 3-6.

[9] Comments of SWBT at 3-4, BellSouth at 4-5. GTE at 10-12, Pacific at 3.

[10] Comments of NYNEX at 10, Pacific at 2, US West at 7, USTA at 3.

[11] Comments of SWBT at 4, USTA at 3.

Commission correctly notes,[12] Black's Law Dictionary defines "[to] deem" as "To hold; consider, adjudge; believe; condemn; determine; treat as if; construe."[13] These multiple meanings hardly lend clarity to Congress' intent. It is just as likely that Congress intended "deemed lawful" to mean "to believe," which, coincidently is also a definition of "to presume." In pertinent part, the definition of the verb "[to] presume" is "to believe or accept upon probable evidence."[14]

BellSouth takes liberties with the language in Arizona Grocery[15] in arguing that ILEC tariffs which conform with the "legislative mandate" cannot subsequently be challenged." BellSouth Comments at 6-7. In Arizona Grocery, the Supreme Court stated that neither a carrier nor a shipper could call into question rates that were filed in accordance with maximum rates that had been legislated by Congress as lawful. 284 U.S. at 388. The legislation at issue here -- Section 204(a)(3) -- does not declare maximum lawful rates, it merely sets out a procedural treatment for tariff modifications. As such, the Court's admonition against challenging a carrier's rates that are consistent with legislated rates is inapplicable.

These carriers misconstrue the statement in Arizona Grocery that the Commission may not "retroactively repeal its own enactment as to the reasonableness of the rate." See, *e.g.*, comments of Bell Atlantic at 6. In fact, the Commission is not "enacting" a determination that an ILEC rate is reasonable and, therefore, the Commission would not be "repealing" that

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[12] Notice at ¶ 10.

[13] Black's Law Dictionary, 5th Ed. (1979).

[14] Id.

[15] Arizona Grocery Co. v. Atchison, T. & S.F., 284 U.S. 370 (1932) ("Arizona Grocery").

determination. What would happen with ILEC tariff revisions filed under the streamlined procedures is that they would be allowed to take effect, without a determination of lawfulness by the Commission. The rates permitted to become effective under this streamlined process have not been determined to be lawful rates, either by Congress or by the Commission.

Contrary to Bell Atlantic's assertion, there is indeed a difference in the passive presumption versus the active determination of lawfulness under review in Arizona Grocery.[16] The heart of the debate on the issue of lawfulness is whether the tariff revision is "just and reasonable" under Section 201(b) the Communications Act. 47 U.S.C. § 201(b). In that regard, the Supreme Court has ruled that the "legal rate" is not made "lawful" by statute, "it was lawful only if it was reasonable."[17]

Some of the carriers supporting the first interpretation of "deemed lawful" conclude that, if the Commission later determines that a rate is unlawful, it would be precluded from awarding damages for the period when the rate took effect until it was determined to be unlawful.[18] Hence, BellSouth claims that once the tariff takes effect, "the Commission is foreclosed from then finding the tariff to be unlawful retroactively and award[ing] damages." BellSouth

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[16] Even USTA acknowledges that no affirmative determination has taken place when it states that "[a]fter the tariff is filed, the Commission may undertake a hearing to make a decision regarding the lawfulness of the tariff." USTA Comments at 3.

[17] See Arizona Grocery, 284 U.S. at 384 and Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 128 (1990).

[18] Comments of Pacific at 6-7, SWBT at 3, USTA at 3-4, NYNEX at 10-11, US West at 4-5. Perhaps USTA merely misunderstands the implications of the first interpretation, for it states that "[c]ustomers will have the same opportunities under the Act to challenge LEC tariff filings and the same remedies as are available to them to challenge the tariffs filed by other providers,...." USTA Comments at 4.

Comments at 5-6. Similarly, Bell Atlantic states that "[w]hile parties may challenge a tariffed rate that was approved under this process on a going-forward basis, they may not obtain recovery for the period prior to a determination that the previously lawful rate has become unlawful." Bell Atlantic Comments at 6.

Were the Commission to adopt the first suggested interpretation of "deemed lawful," the inequitable result would be that an ILEC would be able to retain all profits taken as a result of the unlawful filing, from the effective date until the Commission finds that the tariff provision was based on incorrect -- or even intentionally falsified -- data.[19] It is absurd for these carriers to argue that Congress intended to allow the ILECs to file unreasonable rates and to be insulated against any claim by customers based on those unreasonable rates for the period between the tariff effective date and the date when the Commission determines that the rates are unreasonable.

TW Comm agrees with commenters that the Commission cannot conclude that Section 204 was intended to preclude claims for damages against unreasonable ILEC tariff filings, unless it concludes that Congress intended to overturn "a century of settled law" regarding damages by inference.[20] The right to be awarded damages for harm caused by the unlawful charges, practices, regulations or classifications of a common carrier is a common law right. It has long been held that statutes in derogation of such rights are to be strictly construed.[21] Moreover, traditional statutory interpretation argues against such a conclusion. It is a longstanding principle

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[19] Comments of AT&T at 7, Sprint at 4.

[20] See e.g., Comments of AT&T at 6, Sprint at 3.

[21] See Del Bosco v. U.S. Ski Association, 839 F. Supp. 1470 (D. Colo. 1993).

of statutory construction that statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident.[22] Congress would need to use express language to overturn established law on the issue of damages.[23] There is no express statement to this effect, either in the statute or in the legislative history.[24]

To adopt the first interpretation, the Commission would also need to find that Congress intended this provision to exempt monopoly ILECs from liability for damages while continuing to hold competitive carriers (*e.g.*, interexchange carriers, resellers, etc.) liable for any unreasonable charges. It simply does not make sense that Congress intended to exempt from damages claims only the entities possessing market power. Despite ILEC contentions, market forces do not protect customers against unreasonable ILEC tariff filings. The Commission's full tariff and enforcement powers under Sections 201 through 209 of the Act must be available to redress wrongful tariff filings. Only then can the Commission ensure that ILECs will file tariff revisions consistent with Sections 201(b) and 202(a) of the Act. As the Commission noted, the first interpretation would limit the remedies available to customers for rates, terms, and conditions "that violate Sections 201-202 of the Act." Notice at ¶ 11. Sprint observes that there

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[22] U.S. v. Texas, 507 U.S. 529, 534 (1993), quoting from Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952).

[23] See e.g., United States v. Smith, 499 U.S. 160, 169 (1991) (It is a well-established principle of statutory interpretation that "implied repeals should be avoided.")

[24] See also Sprint Comments at 3, citing Arizona Grocery (stating "[t]here is nothing in the provision itself nor in the legislative history that evidences a Congressional intent to overturn well established precedent that holds that an effective tariff establishes only the legal rate and not the lawful rate.")

is nothing in the provision or in the legislative history that eliminates the Commission's responsibility for determining whether a tariff is lawful under Sections 201 and 202.[25] In the absence of a clear expression of legislative intent to exempt ILECs from the statutory standards of just and reasonableness and against unreasonable discriminations or preferences applicable to all common carriers, there is no basis for construing Section 204(a)(3) in such a manner.

Those ILEC proponents of the first interpretation disregard the public interest standard which overrides the entirety of the Act.[26] While many of them fail to address the customer perspective, NYNEX (at 11) notes, without embarrassment, that the 1996 Act imposes a five-month limit on complaint proceedings against a carrier's tariff and, therefore, "limits the period during which complainants will be exposed to potentially unlawful rates." Pacific argues that, if a rate is lawful when filed, customers can do business "with the assurance that the prices and terms that govern their relations are unlikely to be changed by government action." Pacific at 7-8. This is little comfort if those prices or terms are unreasonable.

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[25] Sprint Comments at 3.

[26] To its credit, Ameritech argues that the presumption of lawfulness should not expand the Arizona Grocery doctrine to limit the award of damages to a customer if that tariff provision is later ruled to be unlawful. Ameritech Comments at 6-8. It explains that if Congress intended to alter the damages remedy for tariffs allowed to go into effect, "it would have so indicated in a more clear and direct fashion." Id.

CONCLUSION

For the reasons discussed above, TW Comm urges the Commission to adopt the second -- or procedural -- interpretation of "deemed lawful" since that interpretation would streamline the tariff filing process without changing the substantive law applicable to tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Reply Comments of Time Warner Communications Holding, Inc." was served this 24th day of October, 1996, via first class mail, postage prepaid, upon the following:

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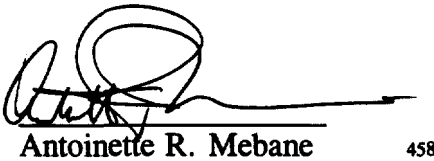

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